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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1017

UNITED STATES OF AMERICA,

Appellant,

v.

MARSHALL & ILSLEY BANK STOCK CORPORATION, MARSHALL & ILSLEY BANK, NORTHERN BANK and the BANK OF COMMERCE,

Appellees.

APPELLEES' RESPONSE FILED AT REQUEST OF THE COURT

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HAMMERSMITH-KORTMEYER CO. MILWAUKEE

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This Court by its Clerk requested us to file in the above entitled appeal a response to this Court's decision on March 27, 1967 in Case Nos. 914 and 972, October term 1966*. Therein this Court resolved certain procedural questions arising in antitrust cases from the language in the Bank Merger Act of 1966 (bank merger act decision). Similar language to that thus construed appears in the

*United States v. First City National Bank of Houston, et al.
United States v. Provident National Bank, et al.

1966 amendment to the Bank Holding Company Act of 1956. However, said 1966 Bank Holding Company Act amendment did not become effective until July 1, 1966, i.e., after the entry on June 15, 1966 of the judgment of dismissal, review of which is sought by this appeal.

The issue in this case is well stated by the Government in its Notice of Appeal as follows:

> "The question persented by this appeal is:
>
> Whether the Bank Holding Company Act, *previous to its amendment in 1966,* deprived the district courts of jurisdiction over suits by the United States under Section 15 of the Clayton Act challenging under Section 7 thereof bank holding company acquisitions approved by the Federal Reserve Board?" (Italics supplied)

A brief history of the jurisdiction of the United States District Courts in respect to enforcement of Section 7 of the Clayton Act (1) as to bank mergers and (2) as to bank stock acquisitions is therefore in order.

As to Bank Mergers

This Court squarely held in 1963 (1) that Section 7 of the Clayton Act applied to bank *mergers,* (2) that jurisdiction to enforce said statute had been by Section 15 of the Clayton Act (15 USC 25) vested in the United States District Courts, and (3) that the enactment of the Bank Merger Act of 1960 had not divested said Courts of said jurisdiction. See *United States v. Philadelphia National Bank,* 374 U.S. 321, at pp. 323 and 350. In so holding this Court noted at page 351 the absence of any requirement that the Comptroller of the Currency conduct a hearing, and the absence of any statutory provision for judicial review of the decision of the Comptroller of the Currency.

The Bank Merger Act of 1966, effective February 21, 1966, explicitly confirmed said jurisdiction in the United States District Courts, albeit subject to a 30 day period of limitations, and a directive to the Courts to apply the substantive rule of law specified therein by the Congress for initial application by the administrative agencies. 12 USC Sec. 1828(c)(7)(B). This Court, in its "bank merger act" decision of March 27, 1967, reviewed these new statutory provisions and declared the phrase "review *de novo*" relating to the jurisdiction of the District Courts under the Bank Merger Act of 1966 was equivalent to "trial *de novo*." (See slip opinion, pp. 6-7)

As to Bank Stock Acquisitions

Section 7 of the Clayton Act, even prior to its 1950 amendment, applied to outright bank stock acquisitions. *Transamerica Corp. v. Board of Governors of Federal Reserve System* (CA 3, 1953), 206 F. 2d 163; see also *United States v. Philadelphia National Bank* (1963), 375 U.S. 321, at p. 335. The jurisdiction to enforce Section 7 of the Clayton Act as to *bank stock acquisitions* was prior to 1956 vested by the Clayton Act concurrently (1) in the Federal Reserve Board by Section 11 (15 USC 21), and (2) in the United States District Courts by Section 15 (15 USC 25). It was this latter jurisdiction which the Trial Court held (see Government's Jurisdictional Statement, p. 2a) Congress intended to nullify by enacting the Bank Holding Company Act of 1956. In so doing it relied (J.S. p. 31a) upon this Court's construction of said Act in *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965), where this Court explicitly held as to this issue at page 420:

> "This position is also supported by legislative history which shows that Congress rejected a proposal

for a *de novo* review in the district courts of Board decisions on holding company proposals. Compare 12 U.S.C. §1848 (1958 ed.) and S. Rep. No. 1095, pt. 1, 84th Cong., 1st Sess., 9 and pt. 2, 84th Cong., 2d Sess., 5, with §9 of H.R. 6227, 101 Cong. Rec. 8187, and H.R. Rep. No. 609, 84th Cong., 1st Sess., 22, 25-26. * * *"

This Court then declared at page 422:

"That Congress has not expressly provided that the statutory procedure is to be exclusive does not require a different conclusion. *For Congress has expressly rejected proposed provisions for review in these cases in the district courts.* Moreover, it has enacted a specific statutory scheme for obtaining review, and where Congress has directed such a procedure as that found in the Bank Holding Company Act of 1956, the doctrine of exhaustion of administrative remedies comes into play and *requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness.*" (Italics supplied) [The statutory provision for review of decisions of the Federal Reserve Board by a Court of Appeals appears in Section 9 of the Bank Holding Company Act of 1956 (12 USC 1848) set forth in the Government's Jurisdictional Statement at page 51a.]

As noted in our brief in support of the Motion to Dismiss or Affirm, the 1966 Bank Holding Company Act amendment repealed, but only as of July 1, 1966, the provisions of the Bank Holding Company Act of 1956, as construed by this Court in the *Whitney Bank* case. Congress in language similar to that employed in the Bank Merger Act of 1966 thereby revested in the United States District Courts the jurisdiction to enforce on and after July 1, 1966, Section 7 of the Clayton Act with respect to bank stock acquisitions.

Section 11(d) and (e) of the 1966 Bank Holding Company Act amendment read, however, as follows:

> "(d) Any acquisition, merger, or consolidation of the kind described in section 3(a) of this Act was consummated at any time prior or subsequent to May 9, 1956, and as to which no litigation was initiated by the Attorney General prior to the date of enactment of this amendment, shall be conclusively presumed not to have been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).
>
> "(e) Any court having pending before it on or after the date of enactment of this amendment any litigation initiated under the antitrust laws by the Attorney General with respect to any acquisition, merger, or consolidation of the kind described in section 3(a) of this Act shall apply the substantive rule of law set forth in section 3 of this Act."

On June 15, 1966, i.e., prior to the enactment of the 1966 Bank Holding Company Act amendment, the trial Court's final judgment of dismissal for lack of jurisdiction of the subject matter was duly entered. Therefore, only if this Court reverses the *Whitney Bank* construction of the Bank Holding Company Act of 1956, can the District Court acquire jurisdiction to enforce Section 7 of the Clayton Act in respect of Appellee's stock acquisitions. In that event the District Court would have to review the bank stock acquisitions involved on the basis of the substantive law standards promulgated by the Bank Holding Company Act amendment of 1966, even though said acquisitions were consummated in December, 1959 and January, 1961, respectively.

CONCLUSION

Manifestly, in view of the foregoing, the bank merger act decision of this Court filed March 27, 1967 which was carefully confined to bank mergers has not affected the basis asserted by Appellees for the granting of their Motion to Dismiss or Affirm. This conclusion is ineluctable because:

(1) the initial issue presented by the Government's appeal is whether it involves "litigation of 'great and general importance' where the government is the aggrieved party", the condition precedent to this Court's jurisdiction under the Expediting Act of February 11, 1903 (see *Shenandoah Valley Broadcasting, Inc. v. American Society of Composers, Authors and Publishers,* 375 U.S. 39 (1963) at page 40;

(2) even if deemed "pending" the Government concedes at page 13 of its Jurisdictional Statement that "this is the only pending antitrust suit attacking acquisitions by a bank holding company" and it was dismissed on June 15, 1966 for lack of jurisdiction prior to the effective date of the 1966 amendment to the Bank Holding Company Act of 1956;

(3) by the express provisions of Section 11(d) of the Bank Holding Company Act amendment of 1966 every other bank stock acquisition consummated prior to July 1, 1966, i.e., including the numerous acquisitions of Appellees' two bank holding company competitors during the period from 1958 to 1961 in which year this suit was started (see Complaint, Jurisdictional Statement, pp. 45a 46a) is now expressly "conclusively presumed not to have been in violation of * * *" Section 7 of the Clayton Act and

(4) any future bank stock acquisitions are not only subject to Section 7 of the Clayton Act but must be approved by Federal Reserve Board and are also reviewable *de novo* in the District Courts on suit by the United States.

This Court's bank merger act decision on March 27, 1967 in no wise militates against granting Appellees' Motion to Dismiss or Affirm.

Respectfully submitted,

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